

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

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CONSUMER ADVOCATE DIVISION

v.

UNITED TELEPHONE SOUTHEAST

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DOCKET NO. 98-00626

EXECUTIVE SECRETARY

ORIGINAL

REPLY TO UTSE AND BELL SOUTH BRIEFS IN OPPOSITION TO REHEARING

The Consumer Advocate contends that the legislative plan dictates what the company may do. The company does not dictate the plans. Neither United's nor BellSouth's responses to the Consumer Advocate Division's Petition to Rehear warrant denial of the Petition. Indeed, both companies fail to address the issues presented in the Petition to Rehear. The failure to address the issues presented is a concession that rehearing is warranted.

Instead of addressing the issues, the companies retreat to the argument that the agency should craft a way to avoid the results of Tenn. Code Ann. § 65-5-209's limitations to a maximum adjustment which is capped using data from the preceding year. They encourage you to find that the General Assembly made a mistake and intended to say preceding "years" or that the maximum adjustment can be a cumulative adjustment. However, the agency has no authority to depart from the statutory language.

The powers exercise by an administrative agency must find its source in an express statutory grant of authority. Sanfil of Tennessee v. Solid Waste Disposal, 907 S.W.2d 807, 810 (Tenn. 1995). An administrative body which has been granted by statute the authority to

promulgate rules and regulations does not have the power to make a rule or regulation which is inconsistent with the law. Tasco Developing and Building Corp. v. Long, 212 Tenn. 96, 368 S.W.2d 65 (1963). Rather, "its actions must be harmonious and consistent with its statutory authority." Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n., 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992). The authority exercised by the Commission must arise from an express grant of statutory authority or be implied from such a grant. Tennessee Public Service Comm'n v. Southern Railway Co., 554 S.W.2d 612 (Tenn. 1977). Case law also, however, indicates that the Commission's statutory powers are to be strictly construed. South Central Bell v. Tennessee Public Service Commission, 675 S.W.2d 718 (Tenn. Ct. App. 1984).

As a result the power of the Tennessee Regulatory Authority *to change the legislative plan* must be authorized by the constitution or statutes. No such authorization exists. An interpretation that cumulative increases are permitted is not harmonious with the statutes.

BellSouth relies on the second sentence of Tenn. Code Ann. § 65-5-209 (e) which provides:

An incumbent local exchange telephone company may adjust its rates for basic local exchange telephone services or non-basic services **only so long as** its aggregate revenues for basic local exchange telephone services or non-basic services generated by such changes do not exceed the aggregate revenues generated by the maximum rates **permitted by the price regulation plan**.

The company (BellSouth) fails to consider, however, what the plan actually permits. What the plan actually and expressly permits is stated in the first sentence of Tenn. Code Ann. § 65-5-209 (e) wherein the statute specifies what is in fact permitted. The sentence states that:

A price regulation plan shall maintain affordable basic and non-basic rates by ***permitting*** a maximum annual adjustment that is **capped** at the lesser

of one half (½) the percentage change in inflation for the United States **using** the gross domestic product-price index (GDP-PI) **from the preceding year as the measure of inflation**, or the GDP-PI from the preceding year minus two (2) percentage points.

There is a distinction between **the plan** and **the company**. The plan permits one and only one thing. The company *may* do what the plan permits but no more.

Statutory Construction Rules.

When the language of a statute is plain and unambiguous, the legislative intent is determined from the face of the statute, and there is no need to use interpretative aids, the statute is applied as written. Carson Creek Vacation Resorts, Inc. v. State, 865 S.W.2d 1, 2 (Tenn. 1993). As the Court stated in Austin v. Memphis Publishing Co., no one has authority:

on consideration of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions or insert qualifications, however abstract justice or the justice of a particular case may require.

655 S.W.2d 146, 148 (Tenn. 1983). The interpretation put forth by the companies is a clear departure from the plain language of the statute.

In addition, the statutory interpretation supporting cumulative increases adopted in the Order violates principles of statutory construction. In particular, the interpretation is contrary to the maxim, **Inclusio Unius est Exclusio Alterius**. In South Central Bell v. Tennessee Public Service Commission, 675 S.W.2d 718 (Tn. Ct. App. 1984) the Court stated that the maxim of **Inclusio Unius est Exclusio Alterius** means:

The express inclusion of one (person or thing) (implies) the exclusion of all others. The cited statute provides for narrowly circumscribed power to grant tentative rates under bond for a limited time under emergency circumstances which were not found by the Commission and are not shown in this case. It must therefore be presumed that:

(1) the Legislature considered that the Commission had no general or inherent power to set tentative rates subject to refund, else the special grant of power would have been unnecessary;

(2) if the Legislature had intended that the Commission have broader powers than those conferred, the statute would have been composed in broader terms.

The maxim applies to the case sub judice, the express inclusion of permitting a maximum adjustment based upon the preceding year, implies the exclusion of a maximum adjustment based upon other or cumulative years. It must be remembered that the General Assembly mandated how a price regulation plan operates, the company the company does not specify how the plan works.

In addition, the other parts of the statute to which the companies refer give rise to the to the maxim **expressio unius est exclusio alterius**. Black's Law Dictionary explains this term as:

A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. . . . Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

Black's Law Dictionary 581 (6th ed. 1990); see also Pryor Oldsmobile v. Motor Vehicle Comm'n., 803 S.W.2d 227 (Tenn. App. 1990).

In Pryor Oldsmobile/GMC Co. Inc. v. Tennessee Motor Vehicle Comm'n., 803 S.W.2d 227, 230 (Tenn. App. 1990), the Court followed the principle that the mention of one subject in a statute means the exclusion of other subjects. As a result the Court held:

In view of the statutory enumeration of specific grounds for denial or cancellation of license, it does not appear that the Legislature intended that other unexpressed grounds be implied.

The agency's order finds unexpressed grounds for cumulative increases that it does not appear were intended by the General Assembly.

In the statute in the case sub judice, each time Tenn. Code Ann. § 65-5-209 conditions change the General Assembly continues to permit only maximum **annual** adjustments or **annual** adjustments. See, e.g., Tenn. Code Ann. § 65-5-209 (f). The continued enumeration of “annual” excludes the use of a different period. The forced or subtle construction of Tenn. Code Ann. § 65-5-209 to create cumulative adjustments or adjustment on other than an annual basis is contrary to and in contravention of the rules of statutory construction.

BellSouth next argues that Tenn. Code Ann. § 65-5-209 (f) allows companies to “accumulate headroom” by deferring rate increases. However, the entire subsection supports CAD's position. The subsection states:

(f) Notwithstanding the **annual adjustments** *permitted* in subsection (e), the initial basic local exchange telephone service rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation. At the expiration of the four-year period, an incumbent local exchange telephone company *is permitted to adjust annually* its rates for basic local exchange telephone services in accordance with the method set forth in subsection (e) *provided that in no event* shall the rate for residential basic local exchange telephone service be increased in any one (1) year by more than the percentage change in inflation for the United States using the gross domestic product-price index (GDP-PI) from the preceding year as the measure of inflation.

The subsection supports the interpretation that only annual adjustments are permitted.

In order to prevent the monopolies from taking excessive advantage of residential customers who will not be competed for, however, the statute provides them with additional

protections. The limitation prevents the shift of an entire annual adjustment (arising from basic and nonbasic services) to residential customers. The annual adjustment permitted will in no event exceed the one year inflation rate. The subsection *does not grant permission* to increase non basic rates in any one of year of the years 1-4, based upon cumulative inflation rates.

Public policy in Tennessee "is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." State ex rel. Swann v. Pack, 527 S.W.2d 99, 112 n. 17 (Tenn. 1975), cert. denied, 424 U.S. 954, 96 S. Ct. 1429, 47 L. Ed. 2d 360 (1976) (citing Home Beneficial Ass'n. v. White, 180 Tenn. 585, 177 S.W.2d 545 (Tenn. 1944)); see also Crawford v. Buckner, 839 S.W.2d 754, 759 (Tenn. 1992). Although the determination of public policy is primarily a function of the legislature, the judiciary may determine public policy in the absence of any constitutional or statutory declaration. Crawford, 839 S.W.2d at 759 (citing Hyde v. Hyde, 562 S.W.2d 194, 196 (Tenn. 1978); Cavender v. Hewitt, 145 Tenn. 471, 475, 239 S.W. 767, 768 (1921)). The sound public policy is the policy expressed in the statutory declaration that adjustments are only permitted annually and they are capped in accordance with the annual formula.

The Stipulation.

In the hearing of this case one of the issues centered around the interpretation *and application* of the "stipulation" and the statute.¹ The Consumer Advocate Division's witness, R. Terry Buckner, upon being asked about the "*methodology* set forth in the stipulation in Docket 96-01423 and conflicts with the requirements of "Tenn. Code Ann. § 65-5-209. Mr. Buckner

¹The Consumer Advocate Division also argued that any cumulative effect of the stipulation was preempted. Moreover, the stipulation has no elision clause.

testified that the methodology of the stipulation is not being attacked. Instead, Mr. Buckner testifies that it is the “interpretation of the methodology.” The Consumer Advocate Division interprets the methodology consistently with the expressed annual intent of the subsection. Our position is that the methodology measures annual adjustments when there are price changes. See, e.g. definition of PRI at page 2 of the stipulation- PRI establishes a ceiling on **price changes** and SPI indicates the percentage change in **actual prices**. As the definitions indicate the stipulation was concerned with measuring price changes and actual prices. The methodology contains no authorization for cumulative price increases. Moreover, the document filed by UTSE expressly states that:

Each party specifically reserves the right to contest any other matter or methodology **to which there is not express agreement**. (Paragraph 3).

It is not appropriate for the agency to make a finding based upon the stipulation unless the express agreement exists. There is no express agreement in the stipulation authorizing UTSE to bypass making annual adjustments.

UTSE and BellSouth further imply that the failure of any party to a stipulation to withdraw from it merely because one of many parties want it interpreted their way is simply not a valid ground for rescinding an agreement unless the agreement permits rescission on that ground.

In City of Nashville v. Kizer, 194 Tenn. 357, 364, 250 S.W.2d 562, 565 the Court stated:

* * * It is the general rule that no intent may be imputed to the legislature in the enactment of a statute other than such as supported by the face of the statute within itself.

Nothing in the face of the statute within itself supports a finding that the maximum annual

adjustment can be cumulative. In fact, the language that the permissible adjustment is capped based upon the prior year is directly contrary to that finding. We respectfully submit that the agency should be guided by what the statute does say, instead of searching for what the statute does not say. This is particularly true when the alternate interpretation negates a portion of the statute.

Not a shred of legislative history, not a sentence in the statute, and certainly no provision of the stipulation prohibits a company from waiving a rate increase which would otherwise be permitted under a price regulation plan. In finding that the stipulation forbid waiver, the agency created something that was not within the four corners of the stipulation.

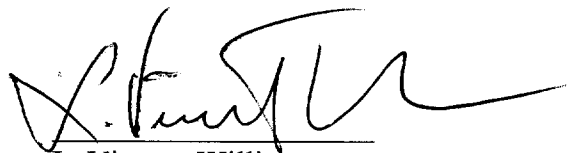
An agency decision is arbitrary and capricious when it is contrary to the plain meaning of the statutory language. Instead of accepting the plain meaning or using it as a guide the agency decision creates what did not exist. Agency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 284, 95 S. Ct. 438, 441-42, 42 L. Ed. 2d 447 (1974); Girard v. City of Glenn Falls, 577 N.Y.S.2d 496, 499 (App. Div. 1991); 5 Kenneth C. Davis, Administrative Law Treatise § 29:7, at 358 (2d ed. 1984). An arbitrary decision is one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. Wagner v. City of Omaha, 236 Neb. 843, 464 N.W.2d 175, 180 (Neb. 1991); Ramsey v. Department of Human Servs., 301 Ark. 285, 783 S.W.2d 361, 364 (Ark. 1990).

Where legislation is free of contradiction and ambiguity, courts are not at liberty to depart from the words of the statute because of the justice of a particular case or supposed

legislative intent. *Carson Creek Vacation Resorts, Inc. v. Department of Revenue*, Tenn. 1993, 865 S.W.2d 1.

The Consumer Advocate Division respectfully submits that the Petition to Rehear of should be granted and the relief requested by the Consumer Advocate Division should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

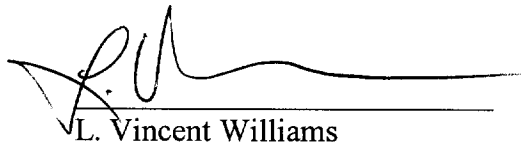
I hereby certify that a true and correct copy of the foregoing Petition has been mailed postage prepaid to the parties listed below this 19 day of November 1999.

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L. Vincent Williams

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST, INC. TARIFF NO. 96-201
TO REFLECT ANNUAL PRICE CAP ADJUSTMENT

DOCKET NO. 96-01423

STIPULATION

This Stipulation is made this 23rd day of January, 1997 by and among United Telephone-Southeast, Inc. ("United"), BellSouth Telecommunications, Inc., Citizens Telecommunications Company of Tennessee, L.L.C., Office of the Attorney General, Consumer Advocate Division, and AT&T of the South Central States, Inc. (herein called the "Parties").

RECITALS

Each of the Parties is a party of record in Docket No. 96-01423 (the "Case") which is pending before the Tennessee Regulatory Authority ("Authority"), and together the Parties constitute all the parties of record in the case.

United is operating under a price regulation plan approved by the Tennessee Public Service Commission effective October 15, 1995.

The Parties have agreed to only those aspects of the methodology expressly stated herein to be used by United in determining its maximum price adjustments under T.C.A. Section 65-5-209(e) (the "Act"), and wish to set forth this agreement in writing.

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NOW THEREFORE the Parties set forth their Agreement as follows:

1. The Parties acknowledge that this Stipulation is subject to and conditioned on approval by the Authority or its designee.
2. The stipulated aspects of the methodology to be applied to United under the Act is set forth on the attached nine page document entitled Price Cap Annual Filing Methodology dated January 23, 1997.
3. This Stipulation applies to the stipulated aspects of the methodology only. Each Party specifically reserves the right to contest any other matter or methodology to which there is not an express agreement, including but not limited to those pertaining to the tariff(s) which are or may be filed in connection with any price adjustments proposed in this proceeding.

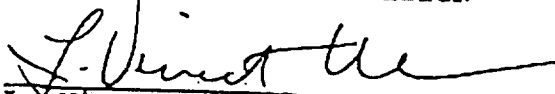
IN WITNESS WHEREOF, the parties have signed this Stipulation effective January 23, 1997.

UNITED TELEPHONE-SOUTHEAST, INC.


James B. Wright
1411 Capital Boulevard
Wake Forest, NC 27587-5900

DATED: 1/23/97

OFFICE OF THE ATTORNEY GENERAL
CONSUMER ADVOCATE DIVISION


L. Vincent Williams
426 Fifth Avenue, North, 2nd Floor
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DATED: 1-24-97

JW

CERTIFICATE OF SERVICE
(UTSE Annual Price Cap Adjustment)

The undersigned hereby certifies that the foregoing Stipulation has been served upon the following counsel of record in Docket No. 96-01423 this 27th day of January, 1997, by FAX, by hand delivery or by placing a copy of the same in the United States Mail postage prepaid and addressed as follows:

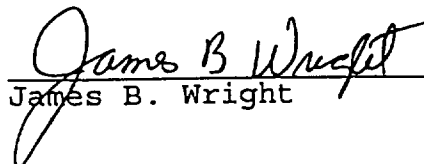
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James B. Wright

I. Purpose

On October 15, 1995, United Telephone-Southeast entered Price Regulation per Chapter 408 of the Public Acts of 1995 (the Act) for the state of Tennessee. In response to the Commission's order approving United's plan, the agreement below reflects the stipulated aspects of Price Cap methodology to be used by United in calculating indexes and any price adjustments to ensure compliance with the Act. Other filings implementing aspects of the stipulation may be made throughout the year in response to customer demand, changing market conditions, or to use any residual opportunity for price changes not incorporated into this filing.

II. Scope

As defined by the Act, Basic and Non-Basic Services category revenues and pricing are governed by the Act. A comprehensive list of United's Basic and Non-Basic services, except as noted, is included as Attachment A.

III. Definitions

Below are definitions of terms used throughout this document. A number of the definitions have been presented verbatim from TCA sections, as noted, to support a comprehensive explanation of the calculations.

A. Basic Local Exchange Telephone Services (Basic Services) - are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on the effective date of the price regulation act or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on the effective date of the price regulation act. Rates for these services shall include both recurring and nonrecurring charges. (Section 65-5-208)

B. Non-Basic Services - are telecommunications services which are not defined as Basic Local Exchange Telephone Services and are not exempted under section 65-5-208 (b). Rates for these services shall include both recurring and nonrecurring charges. (Section 65-5-208)

C. Price Regulation Index (PRI) - establishes a ceiling on price changes, in the aggregate, for the Basic and Non-Basic Services categories. The PRI, as of the effective date of Price Regulation, is one hundred (100). The PRI for subsequent years shall be calculated as described in IV.G. below.

D. Service Price Index (SPI) - indicates the cumulative annual percentage change in actual prices, by service category (Basic and Non-Basic), since the effective date of Price

Regulation, or since the last resetting of the Indexes by the Tennessee Regulatory Authority. The SPIs for the Basic and Non-Basic categories are calculated by category and compared to the PRI. The Service Price Index shall be calculated as described in IV.H. below.

E. Gross Domestic Product-Price Index (GDP-PI) - is the final estimate of the Chain-Weighted Gross Domestic Product-Price Index as prepared by the U.S. Department of Commerce and published in the Survey of Current Business, or its successor. (Section 65-4-101 (h)).

F. Revenues per Category - The revenues included in each category are determined as listed below:

Local (Basic and Non-Basic) - revenues are determined from the number of revenue-producing units multiplied by the corresponding per unit price.

Service Connection Charges/Nonrecurring Charges (NRC) - revenues are determined from the number of revenue-producing units multiplied by the corresponding per unit price. To the extent that detailed service volumes can not be specifically linked to a basic service or specifically linked to a non-basic service, the company will propose a method of allocation and provide documentation supporting the allocation to the Tennessee Regulatory Authority and interested parties. Any interested party may petition the Authority for a hearing on the appropriate allocation method. For United's initial filing, the parties stipulate that the Service Connection and NRC charges are properly allocated between Basic and Non-Basic Services based upon the percentage of revenues where charges are applicable for each category.

Message Toll, Switched Access, Opportunity 800, WATS - revenues are derived from minutes of use multiplied by the corresponding per minute price.

Switched Access - Dedicated, Special Access - revenues are derived from the number of units multiplied by the corresponding per unit price.

Billing and Collection, Public and Semi-Public Phone Revenue, Cellular Interconnection, Directory Compensation, Miscellaneous - revenues are determined from the number of revenue-producing units multiplied by the corresponding per unit price. To the extent that detailed service volumes are not available for any such service, the Company will propose a method for determining these revenues and provide documentation supporting its calculations to the Tennessee Regulatory Authority and interested parties. Any interested party may petition the Authority for a hearing on the proposed method for determining these revenues.